

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DIANE SALIBA</b>	:	
for Redetermination of Deficiencies or for Refund of	:	DETERMINATION
New York State Personal Income Tax under Article 22	:	DTA NOS. 820103 AND
of the Tax Law for the Period July 1, 2000 through	:	820104
September 30, 2002 and for Revision of Determinations	:	
or for Refund of Sales and Use Taxes under Articles 28	:	
and 29 of the Tax Law for the Period June 1, 2001	:	
through November 30, 2002.	:	

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Petitioner, Diane Saliba, 60 Eastfield Lane, Melville, New York 11747-1607, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the period July 1, 2000 through September 30, 2002 and a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2001 through November 30, 2002.

A consolidated hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 16, 2005 at 10:30 A.M., with all briefs to be submitted by November 21, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael P. McKinley, Esq., of counsel).

## ***ISSUES***

I. Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax on behalf of Garfield Associates Corporation, who willfully failed to do so, thus becoming liable for a penalty equal to the unpaid tax pursuant to Tax Law § 685(g).

II. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Garfield Associates Corporation within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) and is, therefore, personally liable for payment of the taxes, penalties and interest due from the corporation.

## ***FINDINGS OF FACT***

1. On July 17, 2003, the Division of Taxation (“Division”) issued seven notices of deficiency to petitioner each of which stated that she was liable as a responsible person or officer of Garfield Associates Corporation (“Garfield”) for a penalty pursuant to Tax Law § 685(g) in an amount equal to the withholding tax not paid by Garfield. The notices of deficiency were as follows:

Period Ended	Penalty	Payments/Credits	Balance Due
09-30-00	\$2,626.42	\$2,000.00	626.42
12-31-00	\$964.22	-0-	\$964.22
09-30-01	\$3,076.91	-0-	\$3,076.91
12-31-01	\$2,183.12	-0-	\$2,183.12
03-31-02	\$3,046.86	-0-	\$3,046.86
06-30-02	\$1,889.51	-0-	\$1,889.51
09-30-02	\$3,132.59	-0-	\$3,132.59

2. Also on July 17, 2003, the Division issued six notices of determination to petitioner each of which advised that she was liable as an officer or responsible person for sales and use taxes determined to be due from Garfield. The notices of determination were as follows:

Period Ended	Tax	Interest	Penalty	Payments/Credits	Total Due
08-31-01	\$7,158.05	\$1,419.74	\$1,867.56	\$4,346.72	\$6,098.63
11-30-01	\$10,102.09	\$2,170.14	\$2,828.56	-0-	\$15,100.79
02-28-02	\$8,017.39	\$1,438.39	\$2,004.28	-0-	\$11,460.06
05-31-02	\$7,749.83	\$785.40	\$1,434.86	\$4,500.00	\$5,470.09
08-31-02	\$5,182.53	\$571.05	\$984.63	-0-	\$6,738.21
11-30-02	\$4,112.89	\$318.63	\$658.00	-0-	\$5,089.52

3. The Certificate of Incorporation of Garfield was filed with the New York State Department of State on October 7, 1992 by Muhammad A. Kazi of 159 Gelston Avenue, Brooklyn, New York 11209. The Certificate of Incorporation did not contain the names of the corporation's officers, directors or shareholders.

4. The Division introduced into evidence a document provided to the Division by the New York State Department of State which states that Mohammad Aslan of 1038 42<sup>nd</sup> Street, Brooklyn, New York 11219 was the chairman of the board of directors of Garfield. The document was signed on October 21, 1993 by D.H. Saliba whose title was "Office Manager - V.P."

5. The Division introduced into evidence 18 checks drawn on Garfield's checking account at Fleet Bank which were payable to the Division<sup>1</sup> for payment of the corporation's sales tax, withholding tax and corporation franchise tax liabilities. The checks were issued at various

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<sup>1</sup> Some of the checks were made payable to the Commissioner of Taxation and Finance, some to New York State Sales Tax, New York State Corporation Tax and New York State Income Tax

times from March 1999 through September 2004. Also attached to this exhibit were New York State corporation franchise tax returns for 2002, a form CT-5 (Request for Six-Month Extension to File) for franchise taxes for 2003, a quarterly sales tax return for the period ended May 31, 2004 and a form NYS-1, Return of Tax Withheld, for the payroll period ended April 27, 2004. While all of the checks for payment of tax which accompanied the returns were signed by petitioner, each of the returns was signed by Patricia David, Bookkeeper.

6. The corporation's New York State General Business Corporation Franchise Tax Return for 2000 was signed by Patricia David, Bookkeeper; the corporation's return for 1999 was signed by M.A. Shea, President.

7. Petitioner's New York State personal income tax returns indicate that she earned, as an employee of Garfield, the sums of \$37,500.00 for 1999, \$32,000.00 for 2000 and \$52,000.00 for 2001.

8. The Division introduced into evidence six quarterly sales tax returns filed by Garfield for the period June 1, 2001 through November 30, 2002. Five of the returns were signed by Patricia David; one return was unsigned.

9. In response to a subpoena served by the Division upon Fleet Bank, the bank provided the application for Garfield's checking account which was opened on April 19, 1993 by petitioner. A corporate banking resolution submitted by Garfield to National Westminster Bank USA (which apparently was later acquired by Fleet Bank) provides that the corporation's president, signing singly, shall have check signing, borrowing and safe deposit authority on behalf of Garfield. The resolution was signed by petitioner, Diane Saliba, as president and secretary.

10. Garfield, incorporated in 1992, is a commercial painting company. Michael Saliba, husband of petitioner, stated that he was the secretary of Garfield and that the president was Muhammad Kazi. While the certificate of incorporation indicates that Garfield has the authority to issue 200 shares of stock, neither Michael Saliba nor Diane Saliba owns any shares.

Michael Saliba stated that he owns and operates Garfield and that he has no idea where Muhammad Kazi is at present. Muhammed Kazi was a contractor with whom Michael Saliba was acquainted. Mr. Kazi wanted to start his own company and asked Michael Saliba to join him. Mr. Kazi initially invested \$10,000.00 in starting the company, and this amount was later paid back to him by Michael Saliba. Mr. Saliba has not seen or heard from Mr. Kazi since 1993. Muhammed Kazi derived no income from Garfield during the years at issue.

Since the company's inception, petitioner, Diane Saliba, has worked in the office. As part of her duties, she answered the telephone, set up appointments, sorted the mail, paid bills, did the banking and wrote whatever corporate checks Michael Saliba instructed her to write. She stated that she may have signed some of Garfield's tax returns although no returns bearing her signature are part of the record. Petitioner was a full-time employee and received a salary from Garfield.

During the period at issue, Garfield employed two women in the office and six men who handled painting duties. Patricia David, Garfield's bookkeeper, prepared and signed the tax returns (Mr. Saliba indicated that he may also have signed some of Garfield's tax returns). Petitioner never prepared any of Garfield's tax returns. Michael Saliba hired and fired all of Garfield's employees; Diane Saliba never hired or fired anyone. Diane Saliba was not involved in determining which of Garfield's creditors (including taxing authorities) were to be paid; Michael Saliba made these decisions.

***SUMMARY OF PETITIONER'S POSITION***

11. Petitioner's husband, Michael Saliba, who claims to be the owner and operator of Garfield, testified that other than being an employee in Garfield's office, petitioner has nothing to do with the financial affairs of Garfield. When petitioner went to the bank to fill out the forms for the establishment of the corporation's bank account, the bank employee asked her what her position was with the company and she replied that she was the secretary. What petitioner meant by that response was that she was employed as a secretary, not that she held that corporate office. Michael Saliba gave petitioner authority to sign checks because he was frequently on the road.

Michael Saliba acknowledged that he and not petitioner was responsible for Garfield's tax liabilities. Petitioner introduced into evidence a letter dated January 20, 2005 from a tax compliance agent in the Division's Suffolk District Office which confirms that Michael Saliba's installment payment agreement with the Division was approved. Pursuant to that agreement, he is to pay the sum of \$1,500.00 per month for 42 months to pay Garfield's tax liabilities. Mr. Saliba testified that as of the date of the hearing, he had stayed current, i.e., he had made six installment payments pursuant to the agreement.

***CONCLUSIONS OF LAW***

A. Tax Law § 1133(a) imposes upon any person required to collect sales tax under Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

B. Tax Law § 685(g) imposes upon any person required to collect, truthfully account for and pay over withholding taxes who willfully fails to collect and pay over such taxes, “a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.” Tax Law § 685(n) defines “person,” for purposes of Tax Law § 685(g), to include, among others, corporate officers and employees who are under a duty “to perform the act in respect of which the violation occurs.” Whether someone is a “person” under a duty to collect and pay over withholding taxes is similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes (*see, Matter of Picciurro*, Tax Appeals Tribunal, August 11, 1994; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990).

C. The holding of corporate office does not automatically impose tax liability upon an office holder (*Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427). Rather, the resolution of whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacy v. State*, 82 Misc 2d 181, 368 NYS2d 448). In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), the Tax Appeals Tribunal stated :

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual’s status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual’s knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual’s economic interest in the corporation [citations omitted] (*Matter of Constantino, supra*).

D. While it is true that petitioner signed checks on behalf of Garfield and appeared on the corporate banking resolution as an officer (president/secretary), the record, when considered in its entirety, reveals that petitioner was not a responsible officer of Garfield. Petitioner was not, in fact, a corporate officer despite what was indicated on the corporation's banking resolution apparently for the purpose of giving her check signing authority; she was merely an office worker who signed checks at the direction of her husband, Michael Saliba, who is the owner and operator of the business. While she testified that she may have signed some tax returns on behalf of Garfield, none of the returns contained in the record bear her signature. Petitioner made no investment in the company; she was a salaried employee. She was not a shareholder of Garfield, nor was she a director. She had no authority to hire and fire employees or to determine which of the corporation's creditors (including taxing authorities) were to be paid first. This was clearly not a case where petitioner could have acted but chose not to (*cf.*, *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027).

In summary, petitioner had no authority over the financial affairs of Garfield and cannot, therefore, be held to be personally liable for sales and use taxes imposed, collected or required to be collected pursuant to Tax Law §§ 1131(1) and 1133(a), nor can she be found to be a person required to collect, truthfully account for and pay over withholding taxes on behalf of Garfield who willfully failed to collect and pay over such taxes. As such, she cannot be subject to the penalty imposed by Tax Law § 685(g).



E. The petition of Diane Saliba is granted and the notices of deficiency and notices of determination issued to petitioner on July 17, 2003 are hereby canceled.

DATED: Troy, New York  
April 27, 2006

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE